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80-5708

No. 80-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

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Supreme Court, U.S.

JOSEPH GREEN BROWN,

Petitioner,

-v-

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO

THE SUPREME COURT OF FLORIDA

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QUESTIONS PRESENTED

1. Whether petitioner was denied his Sixth, Eighth and Fourteenth Amendment rights to a representative and impartial jury in his trial for a capital crime by the systematic and unjustifiable exclusion of jurors (i) who either equivocated regarding their ability to recommend the death penalty and be impartial or (ii) who, although unable to recommend death, could be impartial during the guilt/innocence stage of Florida's bifurcated capital trial procedure?

2. Whether the prosecutor's knowing failure to correct the false testimony of the State's key witness denied petitioner his Fourteenth Amendment right to due process of law?

3. Whether petitioner was denied his Fourteenth Amendment right to due process of law by the trial court's repeated warnings to the key witness for the State that, unless the witness retracted his affidavit swearing his trial testimony to be untrue, the witness was committing perjury and subject to an extensive prison term?

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PETITION FOR WRIT OF CERTIORARI TO

THE SUPREME COURT OF FLORIDA

Petitioner Joseph Green Brown respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Florida in this case.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of Florida is reported at 381 So. 2d 690 (Fla. 1980) and is attached hereto as Appendix A.

JURISDICTION

The judgment of the Supreme Court of Florida was entered on January 31, 1980. A timely petition for rehearing was de-

nied on April 21, 1980.[1] This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(3), petitioner having asserted below and asserting herein deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Sixth Amendment to the Constitution of the United States, which provides in relevant part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ."

and the Eighth Amendment to the Constitution of the United States, which provides in relevant part:

> "Excessive bail shall not be required, nor excessive

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1 This Petition for Writ of Certiorari is untimely. Prior counsel withdrew after direct appeal without notifying petitioner in sufficient time to allow petitioner to obtain volunteer counsel who could file a timely petition in this Court. Petitioner contacted present counsel, who agreed to assist petitioner, after numerous requests for information from prior counsel failed. (See letter from petitioner attached hereto as Appendix B.) Despite assurances from prior counsel that he would promptly forward the record, present counsel did not receive the record until mid-September. The instant petition is being filed 104 days from the date present counsel learned of prior counsel's withdrawal, and approximately 60 days from the receipt of the record.

An untimely Petition for Writ of Certiorari seeking review of a criminal conviction is not jurisdictionally defective. Wilkins v. United States, 441 U.S. 468 (1979); Taglianetti v. United States, 394 U.S. 316 n.1 (1969); Heflin v. United States, 358 U.S. 415, 418 n.7 (1959). This Court has granted certiorari in state criminal cases where the Petition was out-of-time under the Court's rules. See, for example, Fuller v. Alaska, 393 U.S. 80 (1968).

fines imposed, nor cruel and unusual punishments inflicted."

and the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part:

"[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

2. This case also involves the following provision of the statutes of Florida:

"§ 921.141. Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence

(1) Separate proceedings on issue of penalty.--Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized in s.775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in Chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsection (6) and (7). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) Advisory sentence by the jury.--After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon

the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (6);

(b) Whether sufficient mitigating circumstances exist as enumerated in subsection (7), which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life [imprisonment] or death.

(3) Findings in support of sentence of death.--Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (6), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (6) and (7) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s.775.082.

(4) Review of judgment and sentence.--The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within sixty (60) days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed thirty (30) days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) Aggravating circumstances.--Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the

use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(6) Mitigating circumstances.--Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime."

STATEMENT OF THE CASE

On July 7, 1973, Earlene Barksdale, the thirty-four year old mother of five children, was robbed, raped and murdered. Petitioner, a black male then twenty-two years old (R. 1067), was convicted of the crime on June 28, 1974. (R. 1300.) On July 1, 1974, the "death-qualified" jury recommended, by majority vote, the infliction of the death penalty. (R. 1339-41.) Two days later the Court sentenced petitioner to death by electrocution on the murder count, and to consecutive sentences of life imprisonment on the robbery and rape counts. (R. 48-49, 53.)

The case against petitioner lacked any physical evidence tying him to the homicide despite the State's determined efforts to find such evidence -- i.e., no fingerprints, no murder weapon, no blood typing, no connection by pubic hair combing or fingernail scrapings. (R. 616; F.B.I. Report of December 27, 1973; R. 972-73.)[2] Instead, the State's case depended upon (i) the testimony of two patently incredible men, only one of whom could place petitioner at the crime scene and (ii) extensive evidence of another crime (e.g., R. 996-1029, 1096-1101).

The prosecutor elicited the testimony about the other crime, a robbery which occurred at a Holiday Inn on the day after the homicide and to which petitioner had confessed (R. 1021-24), on the theory that such "other crimes" evidence was relevant to the murder because of its purported simi-

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2 Indeed, this evidence revealed that an assailant of Barksdale was someone other than petitioner. (R. 717, 780, 791, 796-98.)

larity.[3] Not only did the jury hear extensive testimony regarding the Holiday Inn robbery, but the prosecutor also introduced the weapon (a .38 caliber revolver) used in that crime. (R. 994.) An F.B.I. report in evidence (R. 1172) revealed that the .38 caliber revolver used in the Holiday Inn robbery could not possibly have been the murder weapon. (R. 1057-58, 1159-60, 1164-68; F.B.I. report of December 27, 1973.) The prosecutor knew this (R. 1057-58, 1164-66) but he told the jury:

> "You are going to find [that the F.B.I. reports] say it's a .38 caliber pistol. .38 caliber bullet. We have a .38 caliber pistol. That there is not enough marks to indicate that it is positively this gun. That is another thing. We just can't do it. If we had had marks, fine. If we don't have them, we can't positively prove it. That it was a Smith and Wesson. Smith and Wesson. You can't say this is the gun. The only way that you could positively say that this was the gun is if you have a bullet that you can check the markings on the bullet and microscopically examine the bullet fired from this gun and the bullet recovered and say they matched exactly. When the bullet is so distorted that you can't do that, then you can't make a positive identification. And that is what we have in this case." (R. 1238-39.)

The prosecutor thus misled the jury by indicating that the .38 caliber revolver used in the Holiday Inn robbery could and might well have killed Barksdale.[4]

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3 In fact, the crimes were more different than similar (i) in one case the robbery was of a couple in a motel room, in the other of a single woman in a business; (ii) one occurred around midnight, the other around noon; (iii) one involved a .38 caliber revolver, the other a .38 caliber special; (iv) in one case the gun placed at the victim's temple was withdrawn, in the other it was discharged; (v) in one case the assailant desisted from his sexual assault at the victim's plea, in the other the victim was raped.

4 As the prosecutor knew, the F.B.I. reports revealed that Barksdale was killed by a .38 special bullet and that such bullets would not fit in the gun used by petitioner in the Holiday Inn robbery. (R. 1058.)

The only person able to place petitioner at the murder scene was Ronald Floyd. By the time he testified, Floyd had twice been convicted of armed robbery (R. 875), and he had not yet been sentenced in one of the two for which he had been convicted (R. 895). Floyd himself was a suspect in the murder, and was preliminarily listed as a co-defendant with petitioner. (R. 1-2.) He testified under oath that the State had made no promises to or agreements with him and that he had not been granted immunity in the murder case. (R. 896.) In fact, Floyd was then lying and the prosecutor knew it. (See, infra, pp. 8-10, 21-23.) Moreover, Floyd only agreed to testify against petitioner in the murder case after petitioner asserted his willingness to testify against Floyd in the Holiday Inn robbery. (R. 1093-94.)

On March 6, 1975, Floyd signed an affidavit swearing that his testimony at trial was false and that it had been given in response to a prosecutorial promise of favorable consideration. (R. 1370-76.) At a hearing held on petitioner's motion for a new trial, Floyd recanted the portion of his affidavit in which he swore that his testimony at trial was false. (R. 1388.) He never recanted that his trial testimony had been given in exchange for favorable consideration from the prosecutor and at the hearing he again so swore. (R. 1375, 1388.)

Floyd's recantation of part of the affidavit resulted from oft-repeated admonitions from the trial court regarding the possibility of a perjury conviction, and a lengthy new sentence, resulting from the affidavit and his hearing testimony supporting it. (R. 1369, 1371, 1376-77, 1379-81.)

During the hearing on the affidavit, the prosecutor conceded that Floyd was telling the truth in swearing that the trial prosecutor had promised him favorable consideration for his testimony. According to the prosecutor, in the course of plea negotiations with Floyd,

> "we discussed with him testifying before the Grand Jury and then testifying in the cause of this particular case, Joseph Green Brown. And that if he would testify and if he would tell us the truth and if he could pass a polygraph that he was not the true man in this offense, that we would not prosecute him for that offense. And that was the only plea negotiations we discussed with Mr. Floyd relative to his testimony. That there was no discussion made that if he testified in this cause, the murder case, that his penalty [in the pending robbery case] would be in any way lessened." (R. 1399.)

Floyd's testimony concerning the agreement is far less conditional. (R. 1388.) Whichever account is believed matters little -- an agreement there was. Nevertheless, at trial, before the Court, the jury, and the prosecutor who made the statement above, the following colloquy took place:

> Defense Counsel: "Has the State made any promises or agreements with you in this case?
>
> Floyd: Not to my knowledge they haven't.
>
> Q. They haven't?
>
> A. No.
>
> * * *
>
> Q. And, so, you've decided to just cleanse your soul and take the chances of whether the State of Florida is going to charge you with this murder?
>
> A. Yes."
>
> (R. 896, 916-17.)

At that time the prosecutor made no effort to correct his witness, allowing him to commit perjury and mislead the jury. Indeed, the prosecutor told the jury in summation:

"And I submit that there has been no promises made to Ronald Floyd for his testifying in this case. He testified to that from the witness stand. He has absolutely nothing to gain by testifying . . . ." (R. 1199.)

Aside from Floyd's highly tentative, patently incredible, and clearly perjurious testimony, the only evidence linking petitioner to the crime was the testimony of Raymond Vinson concerning a statement petitioner supposedly made in the company of Floyd and Vinson on Sunday morning, July 8, 1973. Vinson, a diagnosed schizophrenic, was a convicted felon residing in County Jail at the time of his testimony (R. 802) and he too had been a suspect in the early stages of the within proceeding (R. 1-2). His testimony as to petitioner's supposed statement is too similar to Floyd's to be credible, as their testimony was given a year after the alleged conversation. (Compare R. 806-07 with R. 887-88.)

During the voir dire at petitioner's trial, the State consistently had excused for cause jurors who no more than equivocated regarding either their ability to recommend the imposition of the death penalty or their ability to impartially pass upon petitioner's guilt or innocence. Thus, jurors who thought that the possibility of the imposition of the death penalty "might interfere" or "might influence" their deliberations on petitioner's guilt or innocence or who would be "hesitant" to recommend the death penalty were excused. (R. 137-38, 247-48, 302-306, 322-26.) (Relevant excerpts from the voir dire, including excerpts from the cited pages, are in Appendix C hereto.)

The court also excluded five jurors who stated that they could pass fairly upon petitioner's guilt or innocence despite

their inability to recommend the death sentence. (R. 145-48, 150-51, 153, 162-63, 324-26.)

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

1. On appeal to the Supreme Court of Florida, petitioner specifically urged that he "was denied a fair trial by impartial jury as required by the Sixth and Fourteenth Amendments of the United States Constitution due to the systematic exclusion of prospective jurors who voiced opposition to the death penalty," citing Witherspoon v. Illinois, 391 U.S. 510 (1968). The Supreme Court of Florida noted that defense counsel's objection on that ground only came after nine jurors had been excused and it held that the tenth juror had been properly excluded because the prospective juror "made it clear that her decision as to guilt or innocence might well be affected by her attitude toward the death penalty." 381 So. 2d 690, 693-94. In fact, the tenth juror, although not sure that she could recommend the death penalty, could pass impartially upon petitioner's guilt or innocence (R. 325.), and her excusal raised all of the error claimed by petitioner.[5] It must also be noted that defense counsel objected upon the exclusion of the ninth juror (R. 304-06, 326-27), before the jury was empaneled and while remedial measures were still possible. Among other things, defense counsel objected to the trial court's "systematically eliminating all of those

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5 The Supreme Court of Florida's factual error rgarding the tenth juror's ability to pass impartially upon petitioner's guilt or innocence precluded its determining whether a juror who could pass impartially upon a defendant's guilt or innocence could be excluded for cause from the guilt/innocence stage of the trial.

persons who are specifically only against capital punishment, and [its] not allowing them to at least participate in the decision of whether the person is guilty or innocent." (R. 326.)

2. On appeal to the Supreme Court of Florida, petitioner urged as Point 3 of his brief that the prosecutor's failure to inform the defense that the State's key witness had been offered favorable consideration in return for his testimony denied petitioner "due process" of law, citing numerous federal cases. In his motion for a new trial dated July 16, 1974, petitioner alleged that he had been denied a fair and impartial trial because of prosecutorial impropriety. The Supreme Court of Florida held that the State had denied that it had made promises of favorable consideration to the witness, and that "there [was] nothing in the record to suggest that the State did in fact make such promises." 381 So. 2d 690, 693.

3. In his petition for rehearing before the Supreme Court of Florida, petitioner argued that "[t]he demeanor, manner and method in which the Court proceeding [on petitioner's motion for a new trial was] held . . . by the trial judge violated [petitioner's right to] due process," i.e., that the trial court's pressure on the recanting "key" witness for the state had forced the witness to renounce the affidavit exculpating petitioner. The Supreme Court of Florida denied rehearing on April 21, 1980.

REASONS FOR GRANTING THE WRIT

I.

PETITIONER WAS DENIED HIS SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS TO A REPRESENTATIVE AND IMPARTIAL JURY IN HIS TRIAL FOR A CAPITAL CRIME BY THE SYSTEMATIC AND UNJUSTIFIABLE EXCLUSION OF JURORS (i) WHO EITHER EQUIVOCATED REGARDING THEIR ABILITY TO RECOMMEND THE DEATH PENALTY AND BE IMPARTIAL OR (ii) WHO, ALTHOUGH UNABLE TO RECOMMEND DEATH, COULD BE IMPARTIAL DURING THE GUILT/INNOCENCE STAGE OF FLORIDA'S BIFURCATED CAPITAL TRIAL PROCEDURE

In affirming petitioner's conviction, the Supreme Court of Florida decided a substantial "federal question in a way in conflict with applicable decisions of this Court." It held, contrary to Witherspoon v. Illinois, 391 U.S. 510, rehearing denied, 393 U.S. 898 (1968) and Adams v. Texas, ___ U.S. ___, 100 S. Ct. 2521 (June 25, 1980), that a juror who "made it clear that her decision as to guilt or innocence might well be affected by her attitude toward the death penalty" properly could be excused for cause. 381 So. 2d at 694. Since Florida has the largest death row in the country (142 people) and is sentencing people to death at the rate of three each month, this Court should grant certiorari to correct the Supreme Court of Florida, and to establish firmly the federal constitutional limitations on death-qualifying juries in that State.

Ten prospective jurors were excluded from petitioner's trial. Of those, four did not make unambiguously clear that their feelings in regard to the death penalty would bar them from considering its imposition in the case at hand or that their feelings would prevent them from impartially passing upon petitioner's guilt. Their exclusion, in blatant disregard of Witherspoon v. Illinois, supra, and Adams v. Texas,

supra, clearly violated petitioner's due process rights. Five jurors stated that their feelings regarding capital punishment would prohibit them from recommending the death penalty but that they would have no trouble passing impartially upon the defendant's guilt or innocence.[6] Their exclusion, prejudicial and unnecessary, must also be regarded as a violation of petitioner's rights to a fair and impartial jury.

A. The Exclusion of Equivocating Jurors.

This Court has firmly established that no venireman may be constitutionally excluded from a jury unless unambiguously and categorically unwilling to consider or to reach a verdict allowing for the imposition of the death penalty in any case no matter what the facts. Witherspoon v. Illinois, 391 U.S. 510, rehearing denied, 393 U.S. 898 (1968); Boulden v. Homan, 394 U.S. 478 (1969) (condemning the exclusion of those who did not "believe in" capital punishment or who had fixed opinions against its use); Maxwell v. Bishop, 398 U.S. 262 (1970) (condemning, in a case remarkably similar to the instant one, the exclusion of jurors who thought that their feelings regarding capital punishment might prevent a fair weighing of the defendant's guilt or innocence). Thus, last term, in Adams v. Texas, ___ U.S. ___, 100 S. Ct. 2521 (June 25, 1980), this Court reversed a conviction brought by a jury composed of only those who could take an oath that the mandatory penalty of death or imprisonment for life would not "affect" their delib-

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6 One juror both equivocated regarding his ability to return a recommendation that the death penalty be imposed and stated that he would not be bothered in the guilt/innocence stage of the trial.

eration on any material fact. ___ U.S. at ___, 100 S. Ct. at 2523.

Numerous jurors were excluded from petitioner's trial because they had "problems" with or were hesitant to recommend the imposition of the death penalty or because their decision as to petitioner's guilt or innocence "might" be "influenced" by its potential use. The exclusion of all jurors with perfectly understandable qualms about their responsibility in a capital case insured that only those unaffected by their weighing of life, and therefore only those more ready to recommend a sentence of death, could serve at petitioner's trial. Such is not countenanced by the Fourteenth Amendment.

B. The Exclusion During the Guilt/Innocence Stage of Those Who Could Fairly Pass upon Guilt/Innocence and Whose Difficulties Lay Only with the Penalty.

The Court also excused all jurors who, although unaffected as to their judgment on guilt or innocence, stated that they could not recommend that the death sentence be imposed. (R. 145-48, 150-51, 153, 162-63, 324-26.) The exclusion of these jurors was unnecessary because (1) the guilt/innocence stage of petitioner's trial was, and by statute had to be, distinct from the sentencing stage under the Florida scheme and (2) the jury in Florida merely recommends a sentence, and the court could have inquired of the jurors recommending life imprisonment whether their recommendation resulted from a refusal to recommend the death sentence in any imaginable case or from their weighing of the aggravating and mitigating circumstances in the case at bar -- and then ignored the votes of

those who were unalterably unable to recommend death.[7]

The State's primary justification for death-qualifying a capital jury is to acquire a jury that is capable of imposing the death sentence in an appropriate case. The bifurcated system used in Florida allows the State to obtain its goal by death-qualifying the jury only at the penalty stage. At petitioner's trial, however, jurors who stated that they could fairly weigh the defendant's guilt were excused from the guilt/innocence stage of the trial.

The sole interests which the State could conceivably assert in favor of death-qualification at the guilt/innocence stage are: (1) that, if death-qualification is permissible at the penalty stage, it should also be permitted at the guilt/innocence stage in order to avoid the inconvenience and expense of empaneling two separate juries to hear the two separate stages; and (2) that death-qualification should be permitted at the guilt/innocence stage to prevent death-scrupled jurors from "nullifying" the law by voting to acquit the defendant of the charge or its capital degree, in order to spare him from potential exposure to a death sentence. As the following discussion shows, the State's justifications are insufficient both as a matter of law and of fact.

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7 Under the Florida capital sentencing scheme, a bifurcated trial is held. In the first stage, the jury passes upon the defendant's guilt or innocence. If the defendant is found guilty of a capital offense, evidence is received regarding a series of statutorily enumerated aggravating or mitigating circumstances. The jury then must make a sentencing recommendation by majority vote based on its weighing of the aggravating and mitigating circumstances. Fla. Stat. § 921.141.

The State cannot argue that the jurors excluded at petitioner's trial would have been biased on the issue of guilt or innocence or that they would have nullified the law. Five of those excused plainly stated that they could properly pass upon petitioner's guilt despite their feelings in regard to sentencing.

As for the justification of administrative convenience, this Court has consistently held that "the costs of protecting a constitutional right cannot justify its total denial." Bounds v. Smith, 430 U.S. 817, 825 (1977); Duren v. Missouri, 439 U.S. 357 (1979) and Taylor v. Louisiana, 419 U.S. 522 (1975) (administrative convenience could not justify an automatic jury-duty exception for women); Ballew v. Georgia, 435 U.S. 223 (1978) (administrative convenience could not justify a jury of less than six in a criminal case).

Here, the State can claim at most only a modest administrative interest: if it is not permitted to death-qualify a jury until the penalty stage, and if it succeeds in excluding for cause at that stage a sufficient number of jurors and alternates to require a new jury for the penalty trial, then it may have to reintroduce some part or all of the evidence which it previously presented at the guilt/innocence stage.[8] As in Duren, supra, Taylor, supra, and Ballew, supra, the defendant's substantial constitutional interests (here

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8 Since the jury merely recommends punishment in the Florida scheme, it is by no means clear that Florida would, of necessity, be put through this inconvenience. (See, infra, p. 18.) Moreover, even if necessary, the time lost and the expense incurred will not be very great because capital trials are relatively infrequent.

magnified because of the possibility of capital punishment) plainly outweigh the State's interests in effecting such a relatively small saving of court time and financial cost.

Assuming arguendo that the State's convenience justifies the imposition, there are other available procedures, short of exclusion of impartial jurors at the guilt/innocence stage, that would accommodate both the State's and the defendant's interests. For example, the court could get the guilt/innocence jury's recommendation on sentencing, and ask those jurors who recommended leniency whether they did so out of a weighing of the evidence in the case or whether they did so independent of the evidence, as a result of their unalterable feelings regarding the death penalty. If the recommendation resulted from positions on capital punishment independent of the evidence, the court could overrule the jury and impose a sentence contrary to their recommendation.

In sum, the Witherspoon accommodation between the competing interests of the State and the defendant must be redrawn where the State's interest dissipates to mere inconvenience and expense, and where alternative, less drastic remedies are available to it. The exclusion of jurors able to pass impartially upon petitioner's guilt or innocence from the guilt/innocence stage of petitioner's trial need not and should not have occurred. It is submitted that their exclusion violated petitioner's Fourteenth Amendment right to a representative, fair and impartial jury in his capital trial. This Court should grant certiorari to settle this as yet undecided, important question of federal law.

C. Defense Counsel's Objection.

Although defense counsel did not object until the ninth juror had been excluded, his objection was made before the jury had been empaneled (R. 304-306, 326-27) at a time when remedial measures were still possible. Moreover, two jurors (R. 300-06, 321-26) were excluded in violation of petitioner's Fourteenth Amendment rights over defense counsel's objection -- and the exclusion of even a single juror in violation of the Witherspoon rule is reversible constitutional error. Davis v. Georgia, 429 U.S. 122 (1976).

Assuming arguendo that defense counsel failed to object, his failure cannot be said to have waived petitioner's due process rights. While the question of waiver "must depend, in each case, upon the particular facts and circumstances surrounding that case," Johnson v. Zerbst, 304 U.S. 458, 464 (1938), a few general legal principles are clear. "The question of a waiver of a federally guaranteed constitutional right is, of course, a federal question controlled by federal law." Brookhart v. Janis, 384 U.S. 1, 4 (1966). Under federal law, waiver is "an intentional relinquishment or abandonment of a known right or privilege," Johnson v. Zerbst, supra, 304 U.S. at 464, and it is not lightly to be presumed, Aetna Insurance Co. v. Kennedy, 301 U.S. 389, 393 (1937). Accord: Brookhart v. Janis, supra, 384 U.S. at 4. Inferred waivers of constitutional rights are disfavored, Barker v. Wingo, 407 U.S. 514, 525-526 (1972), and "courts must indulge every reasonable presumption against the loss of constitutional rights," Illinois v. Allen, 397 U.S. 337, 343 (1970), rehearing denied, 398 U.S. 915 (1970).

In view of the special "need for reliability in the determination that death is the appropriate punishment in a specific case," Woodson v. North Carolina, 428 U.S. 280, 305 (1976), the violation of a constitutional norm which "necessarily undermined 'the very integrity of the . . . process' that decided the [defendant's] . . . fate," Witherspoon v. Illinois, supra, 391 U.S. at 523 n.22, obviously implicates "a fundamental right," Estelle v. Williams, 425 U.S. 501, 508 n.3 (1976), which cannot be waived by mere failure of trial counsel to object.

At petitioner's trial, moreover, there was no failure. Remedial measures were still possible when counsel objected on all of the grounds raised in this petition. Petitioner's rights certainly were not waived by his counsel's mere delay.

D. Conclusion.

In this close case, petitioner's death sentence rests upon the verdict and recommendation of a jury predisposed against him. Moreover, the Florida Supreme Court, which reviews more capital cases than any other State Supreme Court, has decided substantial and recurring "federal question[s] in a way in conflict with applicable decisions of this Court." As a result, this Court should grant certiorari and vacate petitioner's death sentence in light of Witherspoon v. Illinois, 391 U.S. 510 (1968) and Adams v. Texas, ___ U.S. ___, 100 S. Ct. 2521 (June 25, 1980).

II

THE PROSECUTOR'S KNOWING FAILURE TO CORRECT THE FALSE TESTIMONY OF THE STATE'S KEY WITNESS DENIED PETITIONER HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS OF LAW

In Giglio v. United States, 405 U.S. 150 (1972), this Court reversed a conviction where the prosecutor (i) had failed to disclose his promise of immunity given in exchange for the testimony of his key witness, (ii) had failed to correct that witness' testimony denying same and (iii) told the jury in summation that the witness had not been granted immunity. The Court held that the prosecutor's action deprived the defendant of due process of law and failed to meet its standards of prosecutorial fairness. Petitioner's conviction resulted from the same improper prosecutorial behavior and must also be reversed.

At petitioner's trial, the prosecutor failed to disclose to the defense that he had promised Floyd that Floyd would not be prosecuted for the Barksdale murder if, inter alia, Floyd testified against petitioner. The prosecutor also allowed Floyd to testify without correction or contradiction that no such promise had been made, and he asserted in his closing argument that he had not offered Floyd immunity.[9] Floyd was the only witness linking petitioner to the crime. His "credibility as a witness was therefore an important issue in the case,

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9 This was not the only evidence of prosecutorial misconduct. Equally egregious was the prosecutor's introduction into evidence of a revolver that he knew was not the murder weapon (as the F.B.I. Report of December 27, 1973 demonstrated), and his argument that the State was merely unable to prove conclusively that that gun was the murder weapon. (R. 1238-39.)

and evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility and the jury was entitled to know of it." Giglio v. United States, supra, 405 U.S at 154.

Although the Supreme Court of Florida found that there had been no agreement between Floyd and the prosecutor, the prosecutor openly admitted that he had agreed with Floyd:

> "that if [Floyd] would testify and if he would tell us the truth and if he could pass a polygraph that he was not the true man in this offense, that we would not prosecute him for [the Barksdale homicide]." (R. 1399.)

In view of this admission, the Supreme Court of Florida's finding cannot withstand scrutiny.[10]

Napue v. Illinois, 360 U.S. 264 (1959) is indistinguishable from the instant case. In both cases the State had promised its key witness in a murder trial lenient treatment in exchange for his testimony, if his testimony "about being a reluctant participant was borne out . . . ." 360 U.S. at 267. In both cases the witness, while testifying, denied the existence of such a promise. In both cases the prosecutor did not correct the witness' false testimony. In Napue this Court held that since the false testimony used by the State in securing the defendant's conviction for murder may have affected the outcome of the trial, its use constituted reversible

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10 "The duty of this Court to make its own independent examination of the record when federal constitutional deprivations are alleged is clear, resting, as it does, on its solemn responsibility for maintaining the Constitution inviolate." Napue v. Illinois, 360 U.S. 264, 271 (1950).

error. The same result is compelled here. This Court should grant certiorari and reverse the judgment of the Supreme Court of Florida, because it "has decided a federal question in a way in conflict with applicable decisions of this Court."

III

PETITIONER WAS DENIED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS OF LAW BY THE TRIAL COURT'S REPEATED WARNINGS TO THE KEY WITNESS FOR THE STATE THAT, UNLESS THE WITNESS RETRACTED HIS AFFIDAVIT SWEARING HIS TRIAL TESTIMONY TO BE UNTRUE, THE WITNESS WAS COMMITTING PERJURY AND SUBJECT TO AN EXTENSIVE PRISON TERM

In Webb v. Texas, 409 U.S. 95 (1972), this Court reversed the conviction of a man whose only witness refused to testify after the trial judge indicated that he "expected [the witness] to lie, and went on to assure him that if he lied, he would be prosecuted and probably convicted for perjury, that the sentence for that conviction would be added on to his present sentence, and that the result would be to impair his chances for parole." 409 U.S. at 97. The unnecessarily strong terms used by the Judge "could well have exerted such duress on the witness' mind as to preclude him from a free and voluntary choice whether or not to testify" (409 U.S. at 98) -- violating the defendant's Fourteenth Amendment right to due process of law.

At petitioner's trial, the court could not have been more coercive. Upon Ronald Floyd's taking the stand at the hearing on petitioner's motion for a new trial based on Floyd's affidavit retracting his convicting trial testimony, the court inquired of Floyd's counsel whether he had advised Floyd of the possible consequences of his testimony. (R. 1368-69.) Coun-

sel had done so, and Floyd began to testify. The court then interrupted and warned Floyd of the consequences of statements regarding the affidavit and asked him if he wanted to speak with counsel. (R. 1371.) Floyd did not want to do so, and continued to testify reiterating, inter alia, that his trial testimony was false. (R. 1375.) When, in cross-examination, Floyd again denied tnat his trial testimony was true, the court again warned Floyd of the danger from his testimony, telling him that "it's obvious to the Court that an answer to that question could incriminate you." (R. 1376.) Shortly thereafter, the court called a recess. It advised Floyd's counsel, in front of Floyd, as follows:

> "I am going to recess now and have you counsel with him. And I wish you would explain to him the consequences of perjury in a capital case. Perjury in a capital case carries a maximum possible penalty, I believe, under present Florida Statutes, of life imprisonment. It's not a twenty-year statutory perjury case, I believe. I believe the witness should be allowed the opportunity to counsel with you further. I don't know that this witness realizes the seriousness of the testimony that he somewhat has given already and maybe is going to give further. I don't know. But this type of perjury is not the normal perjury. When you are dealing with a capital crime, where a witness is accused of perjury in a capital offense, it's up to life imprisonment." (R. 1379-80.)

Just after this admonition, with the potential sentence corrected to 30 years, the witness finally retracted that part of the affidavit that stated that his trial testimony was false. (R. 1386-89.) Counsel for petitioner then inquired whether the witness had committed perjury in swearing the affidavit, and the court held that the affidavit had been retracted. (R. 1389.) Counsel argued further that the affidavit was perjurious, and the court responded by saying that the in-court retraction was reasonably contemporaneous (it came 4 months after the swearing of the affidavit) and therefore cleansed the perjury.

Counsel for petitioner pointed out that, similarly, the affidavit could have been considered a contemporaneous retraction of the trial testimony (eight months separated the trial and the affidavit). The court did not dispute this point, but held that due to the retraction of the affidavit, there was no contemporaneous retraction of the trial testimony. (R. 1390-91.) The court had never hinted during the course of its lengthy admonitions to Floyd that it could apply the contemporaneous retraction rule to Floyd's trial testimony and the "retracting" affidavit. As is obvious, the court had decided that of Floyd's conflicting sworn statements -- the convicting trial testimony and the acquitting affidavit -- it was the trial testimony that had to be preserved. Once the witness capitulated, there was no need for his prosecution for perjury. The court was even gracious enough to recommend that no proceedings be instituted against Floyd. (R. 1394-95.)

The trial court's treatment of Floyd was in blatant disregard of the Webb holding. The court told the witness that "it was obvious that an answer to [a question as to the veracity of his trial testimony] would tend to incriminate him." (R. 1376.) The court further advised the witness that "this type of perjury" subjected him to a severe penalty (at first misstating it to be life imprisonment). The court repeated its warnings not less than four times. The court refused to consider or advise Floyd about the rule allowing for reasonably contemporaneous retraction of perjurious statements even though it applied the rule once Floyd recanted the affidavit. The court plainly indicated that it believed that Floyd had committed perjury -- and presented a terrifying vision of the consequences of that conclusion. There is no doubt that the

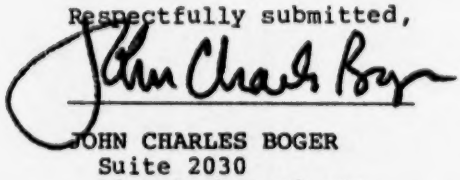
court's conduct "exerted such duress on the witness' mind as to prevent him from making a true and voluntary choice whether or not to testify." Webb v. Texas, supra, 409 U.S. at 95.

Since the trial court forced Floyd to recant the affidavit, petitioner's motion for a new trial was improperly denied. Due process demands nothing less than that there be a new trial at which Floyd would have an opportunity to testify free of coercion, subject to cross-examination based upon his prior conflicting versions of the events. Since the Supreme Court of Florida "has decided a federal question in a way in conflict with applicable decisions of this Court," this Court should grant certiorari and reverse.

Conclusion

For the foregoing reasons, this writ of certiorari should be granted.

Respectfully submitted,



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Dated: November 13, 1980

APPENDIX A

Brown v. Florida
381 So. 2d 690 (Fla. 1980)

[6] Appellant initially argues that he was not shown to have been in possession of the ammunition seized from his residence. Therefore, this evidence which was similar to the murder bullets was inadmissible against appellant. While appellant shared the dwelling with his wife, it is clear that he need not have exclusive possession of premises in which the incriminating evidence was found in order to be charged with its possession. *See Smith v. State*, 279 So.2d 27 (Fla.1973); *Joiner v. State*, 339 So.2d 296 (Fla. 1st DCA 1976); *Frank v. State*, 199 So.2d 117 (Fla. 1st DCA 1967).

[7, 8] Further, appellant maintains that the following statement made at the Dunedin police department is not relevant to prove his guilt of the killings: "Did he [Darrell Hoy] say I did that to those kids? . . . If Darrell said that I did that to those kids he's crazy. You would have to be crazy to do a thing like that."[6] It is argued that it cannot be inferred from this statement that the appellant possessed unique knowledge of the details of the murders. This is so because the deaths were widely publicized for ten days prior to the time appellant made this remark. We reject appellant's contention because it reaches the weight, not the admissibility, of the evidence. The jury could reasonably conclude that this statement was evidence of guilty knowledge of appellant. *Parrish v. State*, 90 Fla. 25, 105 So. 130 (1925); *Darty v. State*, 161 So.2d 864 (Fla.2d DCA 1964), *cert. denied*, 168 So.2d 147 (Fla.1964). The fact that the jury might properly make a contrary determination does not negate the relevance of this evidence to prove appellant's guilt. Results of the comparison between appellant's hair and the hairs removed from the clothing of Susan Rhoutt are likewise relevant and admissible as evidence of the guilt of the accused.

[9] Finally, results of the comparison between the hair of Darrell Hoy and specimens discovered on the body of Susan Rhoutt are relevant with respect to the guilt of appellant. Because evidence that Hoy and appellant were together on the night of the murders was introduced at trial, evidence that Hoy's hair was found in the hair of the victim implicates appellant as well as Hoy.

Due to our reversal of appellant's conviction, it is unnecessary for us to determine whether the sentence of death imposed comports with our pronouncements in *Tedder v. State*, 322 So.2d 908. In the event that appellant is again tried, convicted and sentenced to death, a full review by this Court of the relevant sentence will then be proper.

For the foregoing reasons the judgments and sentences of the Circuit Court for Orange County, Florida, are reversed and this cause is remanded to that tribunal for proceedings not inconsistent with this opinion.

It is so ordered.

ENGLAND, C. J., and ADKINS, BOYD, OVERTON, SUNDBERG and ALDERMAN, JJ., concur.



Joseph Green BROWN, Appellant,

v.

STATE of Florida, Appellee.

No. 46925.

Supreme Court of Florida.

Jan. 31, 1980.

Rehearing Denied April 21, 1980.

Defendant was convicted in the Circuit Court in and for Hillsborough County, Robert W. Rawlins, Jr., J., of rape, robbery and

6. Appellant does not assert that a *Miranda* violation occurred in connection with the making of this statement.

first-degree murder and sentenced to death, and he appealed. The Supreme Court held that: (1) key state witness' subsequent recantation of his trial testimony, coupled with his reaffirmation of that testimony in subsequent hearing, did not constitute grounds for a new trial; (2) where prospective juror made it clear that her decision as to guilt or innocence might well be affected by her negative attitude toward death penalty, trial court properly excused prospective juror; (3) evidence of motel robbery committed on same date as murder was admissible to establish identity of defendant and to show common scheme or general pattern of criminality; and (4) although improper aggravating circumstances went into calculus of trial judge's sentence decision, reversal of death sentence was not compelled.

Affirmed.

1. Criminal Law ⇐942(2)

Key state witness' subsequent recantation of his trial testimony, coupled with his reaffirmation of that testimony in subsequent hearing, did not constitute grounds for a new trial.

2. Criminal Law ⇐1043(1)

Where nine of ten jurors who were excluded had been excused before defendant made his objection on ground that he would be denied a fair trial by an impartial jury by systematic exclusion of prospective jurors who voiced opposition to death penalty, defendant was in no position to complain about exclusion of the first nine jurors on that ground.

3. Jury ⇐108

Where prospective juror made it clear that her decision as to guilt or innocence might well be affected by her negative attitude toward death penalty, trial court properly excused prospective juror.

4. Criminal Law ⇐369.15, 372(4)

Evidence as to motel robbery committed on same date as murder was admissible to establish identity of defendant and to show a common scheme or general pattern of criminality.

5. Homicide ⇐354

In prosecution for capital murder, where there was no evidence that lives of more than one or two persons were threatened by subject homicide, trial court improperly found presence of aggravating factor that defendant "created a great risk of serious bodily harm and death to many persons." West's F.S.A. § 921.141.

6. Homicide ⇐354

In prosecution for rape, robbery and first-degree murder, in application of statute enumerating aggravating circumstances in capital felonies, trial court did not improperly duplicate aggravating circumstances of robbery and pecuniary gain where defendant committed crime of rape in conjunction with murder. West's F.S.A. § 921.141.

7. Homicide ⇐348

Although improper aggravating circumstances went into calculus of trial judge's decision to impose death penalty, reversal of sentence of judgment was not compelled where, in light of ample other statutory aggravating circumstances, trial judge's decision would not have been affected by elimination of unauthorized aggravating circumstances. West's F.S.A. § 921.141.

J. Michael Shea, Tampa, for appellant.

Jim Smith, Atty. Gen., and Charles W. Musgrove, Asst. Atty. Gen., Tallahassee, for appellee.

PER CURIAM.

This is an appeal from a conviction of murder in the first degree and a sentence of death. Jurisdiction vests pursuant to article V, section 3(b)(1), Florida Constitution.

The appellant, Joseph Green Brown, was convicted of rape, robbery, and first-degree murder. The conviction was based primarily on the testimony of Ronald Floyd, who was with the appellant immediately prior to the crime and immediately afterwards. The facts, as revealed by Floyd's testimony,

indicate that on the date of the murder the defendant, Floyd, and a third man known as "Poochie" who has never been located, drove to a clothing shop where the murder was committed. The appellant and Poochie parked the car across the street from the shop and walked into the shop. Apparently unaware of the reason for the visit to the shop, Floyd was left sitting in the car. After waiting for approximately fifteen minutes, Floyd got out of the car and walked over to the front door of the shop. He then heard a gunshot and immediately opened the door and entered the shop. He saw Poochie standing in the doorway of what appeared to be a storage room in the rear of the shop. When Floyd looked over the counter, he saw the body of the victim on the other side of the storage room door. The three men then raced out of the shop and drove speedily away. While in the car, Poochie turned to the appellant and said, "Man, you didn't have to do that." Floyd testified that when appellant first got out of the car to cross the street and enter the clothing store, he had a bulge in his shirt which seemed to be a gun. According to Floyd, all of these events took place in the early afternoon of July 7, 1973.

At approximately 9:30 that evening, the body of the victim was discovered in the storage room of the clothing store. She had been raped and murdered. On the evening of and subsequent to the murder, the defendant and Floyd robbed a couple in a motel and appellant sexually assaulted the female. The following day, the appellant turned himself in to law enforcement officers for the motel robbery.

A verdict of guilty was returned by the jury and an advisory recommendation of a sentence of death was rendered. Appellant was adjudged guilty and sentenced to death on July 3, 1974. On appeal, appellant seeks a new trial on the grounds that: (1) after the trial, Floyd denied that his testimony was true, although he ultimately reaffirmed the truth of his testimony; (2) the prosecuting attorney failed to furnish Floyd's statements pursuant to rule 3.220(a), Fla.R. Crim.P.; (3) the state failed to inform appellant's counsel that Floyd's testimony was given in return for favorable consideration in criminal matters pending against him; (4) the appellant was denied a fair trial by an impartial jury due to the systematic exclusion of prospective jurors who voiced opposition to the death penalty; and (5) the appellant was denied a fair trial by an impartial jury due to the prejudicial effect of admitting testimony of other unrelated offenses.

I

[1] We are not persuaded by appellant's argument that Floyd's subsequent recantation of his trial testimony, when coupled with his reaffirmation of that testimony, constitutes grounds for a new trial. After appellant was convicted, appellant's counsel secured from Floyd an affidavit wherein Floyd stated that his testimony against appellant in this murder trial was false. The affidavit was notarized by the defense counsel and given by Floyd while he was incarcerated at the Union Correctional Institute. Floyd and appellant's counsel were the only persons present at the time the affidavit was prepared and signed. While the case was here on appeal, this Court granted appellant's motion for remand for further consideration in light of the Floyd affidavit. At a hearing on appellant's motion, Floyd admitted signing the affidavit, but reaffirmed his trial testimony and said that statements to the contrary in the affidavit were false. As to some questions, he exercised his right to remain silent. The trial court denied appellant's motion for a new trial because it was based solely on the Floyd affidavit which had been retracted and denounced by Floyd at the hearing on the motion. We considered a similar challenge in *Bell v. State*, 90 So.2d 704, 705 (Fla.1956). There we said, citing *Henderson v. State*, 135 Fla. 548, 185 So. 625, 630 (1939):

> A material error or misstatement in the testimony of a witness for the prosecution may constitute ground for a new trial. Where therefore it appears, that, on a new trial, the witness will change his testimony to such an extent as to render

probable a different verdict, the new trial will be granted. But recantation by witnesses called on behalf of the prosecution does not necessarily entitle defendant to a new trial. The question whether a new trial shall be granted on this ground depends on all the circumstances of the case, including the testimony of the witnesses submitted on the motion for the new trial. Moreover, recanting testimony is exceedingly unreliable, and it is the duty of the court to deny a new trial where it is not satisfied that such testimony is true. . . .

We agree with the trial court that a witness's post trial recantation of testimony, followed by a clear retraction of the post trial statements, is not sufficient to overturn a jury verdict and sentence. Under the circumstances here, as in *Bell*, "the trial judge's skepticism as to the truth of the matter contained in the affidavit is understandable." *Id.* at 705. We find no abuse of discretion in his denying the motion for new trial on this ground.

II

Appellant next charges that the state failed to furnish several of Floyd's statements to his counsel pursuant to rule 3.220(a), Fla.R.Crim.P. We previously remanded this cause to the circuit court for determination of whether Floyd's statements were in the possession of the state and not produced for the defense. After an evidentiary hearing on the matter, the trial court determined that all statements made by the witness to which the defense would be entitled were in fact furnished to defense counsel prior to the trial. Since we find nothing in the record to cast doubt on that determination, we find no merit in this point.

III

Appellant next argues that he is entitled to a new trial on grounds that the state failed to inform defense counsel that the testimony of the state's key witness, Floyd, was given in return for favorable consideration in this and other criminal matters pending against Floyd. Floyd testified at trial that the state had given him no promises of favorable consideration in this case or any other case as an inducement for his testimony against appellant. This testimony is consistent with the state's version of the pre-trial discussion with Floyd. The appellant's claim is based on statements made in the March, 1975, affidavit of Floyd which indicated that the state had promised favorable treatment in exchange for his testimony against the appellant. Although Floyd retracted part of that statement at an evidentiary hearing on the matter, at that same time he reaffirmed his claim as to promises of favorable treatment. At that same hearing, the state denied that any such promises were made. The appellant's claim rests solely on the affidavit of Floyd. There is nothing in the record to suggest that the state did in fact make such promises. Although he had an opportunity to do so at the evidentiary hearing on the matter, appellant offered no testimony to substantiate the affidavit. By remaining silent while a witness testifies in a manner wholly consistent with the state's view of the facts, we do not believe that the prosecution engaged in the "deliberate deception of a court and jurors" which is necessary to reverse a conviction on these grounds. *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972).

IV

[2] Appellant charges that he was denied a fair trial by an impartial jury due to the systematic exclusion of prospective jurors who voiced opposition to the death penalty. *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). We disagree. Nine of the ten jurors who were excluded had been excused before the appellant made his objection on this ground. In *Paramore v. State*, 229 So.2d 855 (Fla. 1969), *vacated on other grounds*, 408 U.S. 935, 92 S.Ct. 2857, 33 L.Ed.2d 751 (1972), we responded to a similar argument by stating:

If defendant objects to a prospective juror being excused he should make his objection before the juror is excused. . . . When these three prospective jurors ex-

pressed their convictions against the infliction of the death penalty, appellant's attorney made no effort to qualify them for service. Perhaps he did not want them for some other reason. It was not the duty of the trial court to take other steps toward attempting to qualify the veniremen, and the *Witherspoon* case, *supra*, should not be construed as imposing this additional duty upon the trial court in the absence of any expression of a desire by defense counsel to keep the prospective jurors. . . . The appellant is in no position to complain in the instant case because no objection was interposed . . . .

Id. at 858.

The one prospective juror who was excused after timely objection was properly excused for cause in accordance with the *Witherspoon* standards. During the voir dire examination of that prospective juror, the following colloquy occurred:

A I have been listening all afternoon but sitting up there I just don't think I could recommend a verdict of death. Capital punishment.

Q (Prosecuting attorney) Well, would this stem from your feeling that you would have about the death penalty?

A Yes. I don't think I could recommend for anyone to be put to death.

Q Regardless of the circumstances.

A I don't think so. Life imprisonment yes, but not the death penalty.

. . . . . .

Q (Defense attorney) Ma'am, if I may get this just straight, I have tried to pin down exactly what it is that you feel that would hinder you in your decision. Is it the fact that you might have to recommend, should we get to the second portion of this trial, the death penalty?

A Yes, sir.

Q That is what bothers you?

A Yes.

Q Specifically that? And would it hinder you in reaching your decision as to guilt or innocence?

A Well it might if I thought I recommended guilty and he would be put to death, or whoever it was.

[3] We have recently held that a prospective juror may be excused for cause if it is shown that he "would vote against death regardless of the facts presented or the instructions given." *Jackson v. State*, 366 So.2d 752, 755 (Fla.1978). We have also upheld the exclusion of a prospective juror who said that he "wouldn't know" if he could find the defendant guilty where it might result in capital punishment. *Williams v. State*, 228 So.2d 377, 381 (Fla.1969), *vacated on other grounds*, 408 U.S. 941, 92 S.Ct. 2864, 33 L.Ed.2d 765 (1972). There, we stated:

As was said in *Witherspoon*, "The most that can be demanded of a venireman * * * is that he be willing to *consider* all of the penalties provided by state law * * *." 391 U.S. at 522, 88 S.Ct. at 1777, n. 21. If, upon questioning, the prospective juror says he doesn't know whether he can vote for conviction if it might mean the electric chair, then the State cannot determine his willingness to consider all penalties, nor can it determine whether or not the veniremen's attitude toward the death penalty would prevent him from making an impartial decision as to guilt.

Id. at 381 (emphasis in original). In this case, the prospective juror made it clear that her decision as to guilt or innocence might well be affected by her attitude toward the death penalty. We find that the trial court correctly followed the dictates of *Witherspoon* and properly excused this prospective juror.

V

[4] Appellant also argues that testimony of unrelated offenses was admitted in violation of the "Williams rule." *Williams v. State*, 110 So.2d 654 (Fla.1959). We have reviewed the trial testimony with regard to the motel robbery committed on the same date as this murder and conclude that the offenses are sufficiently related in time and in circumstances as to withstand a Williams

rule challenge. The evidence as to the motel robbery was relevant to establish both the identity of the appellant and to show a common scheme or general pattern of criminality. We reject the appellant's final argument.

We must finally determine whether the sentence of death is appropriate under the statutory scheme of capital punishment in this state. The trial judge made the following findings:

AS TO AGGRAVATING CIRCUMSTANCES:

1. That the Defendant, JOSEPH GREEN BROWN, murdered EARLENE EVANS BARKSDALE from a premeditated design to effect the death of the said EARLENE EVANS BARKSDALE.

2. That the Defendant, JOSEPH GREEN BROWN, in committing the capital felony, for which he has been convicted, in a public place knowingly through his voluntary and intentional act leading up to and during the course of the commission of the offense created a great risk of serious bodily harm and death to many persons.

3. That at the time the Defendant, JOSEPH GREEN BROWN, committed the capital felony, for which he has been convicted, he was engaged in the commission of the crimes of Robbery and Rape.

4. That the capital felony for which the Defendant, JOSEPH GREEN BROWN, is to be sentenced was committed for pecuniary gain.

5. That the murder of EARLENE EVANS BARKSDALE was especially heinous, atrocious and cruel.

AS TO MITIGATING CIRCUMSTANCES:

1. The Defendant, JOSPEH GREEN BROWN, has a significant history of prior criminal activity.

2. That the capital felony for which the Defendant, JOSEPH GREEN BROWN, was convicted was *not* committed while the Defendant, JOSEPH GREEN BROWN, was under the influence of extreme mental or emotional disturbance.

3. That the victim, EARLENE EVANS BARKSDALE, was *not* a participant in the Defendant's conduct nor did the victim, EARLENE EVANS BARKSDALE, consent to the act.

4. That the Defendant, JOSEPH GREEN BROWN, was *not* merely an accomplice with relatively minor participation but was rather totally involved in the commission of the capital offense.

5. That the Defendant, JOSEPH GREEN BROWN, did *not* act under extreme duress during the course of the commission of the offense nor was he, during that period of time under the substantial domination of another person.

6. That at the time of the commission of the offense the Defendant, JOSEPH GREEN BROWN, had the capacity to appreciate the criminality of his conduct and the ability to conform his conduct to the requirements of law.

7. The age of the Defendant, JOSEPH GREEN BROWN, to-wit: age 23 years, thus making him a mature male, has some minor significance and is, therefore, a mitigating circumstance.

THEREFORE, it is the Opinion and Determination of this Court, and the Court so finds that aggravating circumstances do exist, and that these aggravating circumstances far outweigh any circumstances which would mitigate the sentence in this case.

WHEREFORE, the Court finds that the Defendant, JOSEPH GREEN BROWN, by his willful, deliberate, malicious and premeditated act took the life of EARLENE EVANS BARKSDALE without justification or excuse. The Defendant, JOSEPH GREEN BROWN, knew full well the seriousness and the ultimate consequences of his act when he from a premeditated design took the life of EARLENE EVANS BARKSDALE. The Defendant, JOSEPH GREEN BROWN, in an extremely heinous, atrocious and cruel manner shot and killed EARLENE EVANS BARKSDALE after raping the said EARLENE EVANS BARKSDALE. The Court finds that

based on all the facts and circumstances presented the Defendant, JOSEPH GREEN BROWN, by the acts and methods employed in the commission of this offense has been and would continue to be a danger and a menace to society and therefore must pay the ultimate penalty, death by electrocution, as provided by the laws of the State of Florida.

[5] The trial court improperly found that the appellant "created a great risk of serious bodily harm and death to many persons." In *Kampff v. State*, 371 So.2d 1007 (Fla.1979), we held that this aggravating factor is not present unless a great risk of death is created to "many" persons, not one or two. The record before us does not support a finding that the lives of many persons were threatened by the present homicide.

[6] The lower court did not improperly duplicate the aggravating circumstances of robbery and pecuniary gain, as appellant contends, since Brown committed the crime of rape in conjunction with the murder. *Provence v. State*, 337 So.2d 783, 786 (Fla. 1976).

[7] Although improper aggravating circumstances (factors enumerated 1 and 2) went into the calculus of the trial judge's sentence decision and there was identified a mitigating circumstance (appellant's age), nevertheless, *Elledge v. State*, 346 So.2d 998 (Fla.1977) does not compel a reversal of the sentence judgment in this case. This is so because unlike *Elledge*, here "we can know" that the result of the weighing process would not have been different had the impermissible factors not been present. 346 So.2d at 1003. The trial judge has told us in his order that the appellant's age, 22 years at the time of the offense and 23 years at the time of the trial, had only "some minor significance." When this tenuous factor is juxtaposed against at least two well-founded aggravating circumstances it is beyond reason to conclude that the trial judge's decision to impose the death penalty would have been affected by the elimination of the unauthorized aggravating circumstances. This case then is dissimilar to *Elledge*, but like *Hargrave v. State*, 366 So.2d 1 (Fla.1978), where the doubling up of aggravating circumstances was not fatal to the imposition of a death sentence even in light of the existence of two mitigating circumstances. Here, as there, ample other statutory aggravating circumstances exist to convince us that the weighing process has not been compromised. Given the imprecision of the criteria set forth in our capital punishment statute* we must test for reasoned judgment in the sentencing process rather than a mechanical tabulation to arrive at a net sum. *Hargrave v. State*, supra; *State v. Dixon*, 283 So.2d 1 (Fla.1973).

Accordingly, the judgment of conviction and sentence of death must be affirmed.

It is so ordered.

ENGLAND, C. J., and ADKINS, BOYD, OVERTON and SUNDBERG, JJ., concur.



Kenneth EDWARDS, Appellant,

v.

STATE of Florida, Appellee.

No. 56832.

Supreme Court of Florida.

Jan. 31, 1980.

Rehearing Denied April 18, 1980.

Defendant sought review of an order of the Circuit Court, Martin County, Dwight L. Geiger, J., which found certain criminal statutes to be constitutional. The Supreme Court held that: (1) the inference created by the statute which provides that proof of

* § 921.141, Fla.Stat. (1973).

APPENDIX B

Letter dated July 15, 1980
from Joseph Green Brown
to the Supreme Court of the
United States

Joseph G. Brown
P. O. Box 747
Starke, Florida - 32091

July 15, 1980

To whom it may concern:

Dear Sir(s), Ms.(s):

I am a death row prisoner, here at the Florida State Prison, Starke, Florida. The reason for this communication is a request for legal representation.

I've been on death row for over six(6) years and incarcerated for over seven(7). On January 31, 1980, the Florida Supreme Court affirmed both my conviction and sentence. On April 21, 1980, my Petition for Re-hearing was denied.

My present attorney, J. Michael Shea 419 W. Platt Street, Tampa, Florida - 33606; yet to visit me to discuss either Ruling. Though he did write me that he would visit me on June 24, 1980. Today's exactly, three(3) weeks since his supposed visit. But, he has yet to come, or call, or write nor respond to the letter I've written inquiring as to why he did not visit as he said.

At this point I've lost respect and trust in him and feel that if I allow him to continue as my Legal Representative I will not receive Adequate Legal Representation. I am aware that after a decision was rendered on the Petition for Re-hearing, I had ninety(90) days in which to file Petition for Certiorari in the U.S. Supreme Court. But here, I am totally ignorant as to whether this has been done and the ninety(90) days expires on Monday, the coming week.

I'm forwarding copies of this letter to several organizations whose names and addresses will be listed at the close of this, in hopes that I will receive a favorable response from one, if not all of you. Please feel free to request any information or legal papers that may aid you in your decision to grant me the legal representation that I seek. I also request a speedy response.

I THANK EACH OF you FOR your KIND CONSIDERATION AND ATTENTION REGARDING THIS MATTER.

Respectfully Yours

J G Bass

MS. Deborah Fins
NAACP Legal Defense and
Education Fund, Inc.
10 Columbus Circle, Suite 2030
New York, N.Y.- 10019
Capital Punishment Project

National Prison Project of
The ACLU Foundation
1346 Connecticut Ave. N.W.
Washington, D.C.- 20036

Amnesty International
200 West 72nd Street
New York, N.Y.

National Lawyers Guild
23 Cornelia Street
New York, N.Y.- 10014

Florida Legal Services, Inc.
Prison Project
2614 S.W. 34th Street
Gainesville, Florida- 32609

APPENDIX C

Excerpts from the Voir Dire

EXCERPTS FROM THE VOIR DIRE

PROSECUTOR: "Now, the important thing that we must discuss with you is whether or not this would affect your deliberations in this case . . . . [H]ow do you feel about that? Do you have any strong feelings one way or the other about capital punishment?

* * *

PROSECUTOR: Capital punishment doesn't come in to play unless you as a juror come to the conclusion there is no reasonable doubt in your mind that Mr. Brown is guilty of first degree murder. From that point, then we get into the sentencing aspect of it. But actually, my question goes just to a philosophical type of a question. Do you have any conscientious convictions or beliefs with regard to the death penalty that would affect your deliberation in this case.

JUROR NO. 1: Am I for it or against it? Is that what you are asking me?

PROSECUTOR: Well, it is not -- what I am asking you, do you feel so strongly about it one way or the other that it would affect the way you would deliberate the guilt or innocence of Mr. Brown?"
(R. 132-33, emphasis added.)

* * *

PROSECUTOR: "Okay. Mr. Fray, how about you, sir?

JUROR NO. 12: I am not quite sure.

PROSECUTOR: Okay. You are not quite sure. How do you feel about capital punishment? Or you are not quite sure about it, if you could put it out of your mind?

JUROR NO: 12: Whether it would influence my decision concerning guilt or innocence.

PROSECUTOR: Okay. You understand the law in Florida is that you shouldn't consider the penalty in the determination of guilt or innocence of the accused, in any case, be it petit larceny or burglary or any crime. The penalty should never be considered. We have a special problem with first degree murder, because we have people in our society that feel very strongly that capital punishment shouldn't be imposed. We shouldn't have capital punishment. And, of course, I am not saying anybody is right or anybody is wrong. That is not what we are discussing. But people feel very strongly that we shouldn't have capital punishment, they might let this feeling perhaps go over into the determination of guilt or innocence, which it really shouldn't. And if you are of that mind, I would like to know. If you think it might interfere with you.

JUROR NO. 12: I think it might interfere.

APPENDIX C

PROSECUTOR: You think that it might interfere with your determination of guilt or innocence?

JUROR NO. 12: (Nodded affirmatively.)

PROSECUTOR: Okay. Your Honor, the State would at this time move to challenge Mr. Fray for cause."
(R. 137-38, emphasis added.)

* * *

JUROR NO. 1: "I do not believe in capital punishment. I --

PROSECUTOR: I'm sorry. What?

JUROR NO. 1: I said I did not believe in capital punishment.

PROSECUTOR: Right. Well, the issue is not really whether or not you believe in capital punishment. The issue is whether or not you would let this feeling you have with regard to capital punishment influence the way you would deliberate the case. Do you feel that it would?

JUROR NO. 1: Yes.

PROSECUTOR: You feel that it might influence whether or not you could find Mr. Brown guilty or not?

JUROR NO 1: Yes.

PROSECUTOR: Your Honor, in light of Miss Miller's statement she just made, I would challenge her for cause."
(R. 248, emphasis added.)

* * *

PROSECUTOR: "Is there anything outside the courtroom that would be weighing on your mind while you are in here, to prevent you from deliberating, do you think?

JUROR NO. 1: Well, I have mixed feelings when it comes to corporal punishment.

PROSECUTOR: Okay. With regard to this issue of the death penalty, do you have any strong feelings with regard to the death penalty?

JUROR NO. 1: No, I don't. I am afraid I would not be able to render the right decision.

PROSECUTOR: Okay.

JUROR NO. 1: I am a little bit lenient when it comes to young people.

PROSECUTOR: Now, the question is, as you know, you have probably heard us discussing it while you were sitting in

the back. Mr. Brown is charged with three crimes, murder, rape and robbery. He is charged with first degree murder, which is an offense which carries possible punishment of death in the electric chair. Now the question is, do you have any strong feelings with regard to the death penalty that would hinder you in deciding whether or not Mr. Brown is, in fact, guilty of first degree murder? Do you feel that you would have problems finding him guilty of first degree murder, knowing that he might go to the electric chair?

JUROR NO. 1: I do.

PROSECUTOR: You really feel that you would?

JUROR NO. 1: I sure do.

PROSECUTOR: Would you have any hesitation recommending the death penalty regardless of what aggravating circumstances I show, do you feel that you would be hesitant to recommend the death penalty?

JUROR NO. 1: Yes, I feel I would."
(R. 302-03, emphasis added.)

* * *

JUROR NO. 9: "Yes, sir. I'm sorry, but I have been sitting here wrestling with my conscience, and I don't think I could recommend a verdict for the death penalty. I'm sorry. I should have --

* * *

JUROR NO. 9: I have been listening all afternoon, but sitting up there I just don't think I could recommend a verdict of death. Capital punishment.

PROSECUTOR: Well, would this stem from some feeling that you have about the death penalty?

JUROR NO. 9: Yes. I don't think I could recommend for anyone to be put to death.

PROSECUTOR: Regardless of the circumstances?

JUROR NO. 9: I don't think so. Life imprisonment, yes. But not the death penalty.

PROSECUTOR: Do you understand that the law in Florida is that if we get to the second phase of the trial proceeding, and if you listen to all the aggravating and mitigating circumstances, evidence, and you determine that the aggravating circumstances outweigh the mitigating circumstances, then under the law you are supposed to recommend the death penalty? Is that what you are saying you feel you are not able to do?

JUROR NO. 9: No, sir. Yes, sir, I don't feel I would be able to do that.

PROSECUTOR: Regardless of what we showed?

JUROR NO.9: No, Sir, not in my clear conscience, no. I think it would bother me for the rest of my life.

PROSECUTOR: All right. I thank you for your honesty in bringing this to our attention. The State would challenge [Juror No. 9] for cause.

[Defense counsel then questioned Juror No. 9, in part as follows.]

* * *

DEFENSE COUNSEL: But would it, now, would it [bother you] as to the guilt or innocence or only as to whether you had to recommend the death penalty in the second part?

JUROR NO. 9: Maybe I could decide whether the defendant was guilty, but I don't think that I could recommend the death penalty.

DEFENSE COUNSEL: Well, let me ask you this. If it was the responsibility of the jury, then, not to do the second part, you wouldn't have any problem; is that what you are saying? If you only had to decide guilt or innocence, and it was up to his Honor to make the decision as to the sentence, would you have any problem with that?

JUROR NO. 9: No, not deciding whether he was guilty or not. But if we had to recommend the death penalty, that would be -- I couldn't, I dont think I could do that."
(R. 322-25, emphasis added.)

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SUPREME COURT, U.S.

NO. 80- 5708

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

ORIGINAL COPY

JOSEPH GREEN BROWN,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE

SUPREME COURT OF FLORIDA

RESPONSE OF RESPONDENT STATE OF FLORIDA IN OPPOSITION TO PETITION FOR CERTIORARI

JIM SMITH
ATTORNEY GENERAL

CAROLYN M. SNURKOWSKI
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(904) 488-0290

COUNSEL FOR RESPONDENT

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

NO. 80-

Joseph Green Brown,

Petitioner,

-vs-

State of Florida,

Respondent.

RESPONSE OF RESPONDENT, STATE OF FLORIDA IN OPPOSITION TO PETITION FOR CERTIORARI

TO: THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT.

QUESTIONS PRESENTED

I. WHETHER PETITIONER WAS DENIED HIS SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS TO A REPRESENTATIVE AND IMPARTIAL JURY IN HIS TRIAL FOR A CAPITAL CRIME BY THE SYSTEMATIC AND UNJUSTIFIABLE EXCLUSION OF JURORS 1) WHO EITHER EQUIVOCATED REGARDING THEIR ABILITY TO RECOMMEND THE DEATH PENALTY AND BE IMPARTIAL, OR 2) WHO, ALTHOUGH UNABLE TO RECOMMEND DEATH, COULD BE IMPARTIAL DURING THE GUILT-INNOCENCE STAGE OF FLORIDA'S BIFURCATED CAPITAL TRIAL PROCEDURE.

II. WHETHER THE PROSECUTOR'S KNOWING FAILURE TO CORRECT THE FALSE TESTIMONY OF THE STATE'S KEY WITNESS DENIED PETITIONER HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS OF LAW.

III. WHETHER THE PETITIONER WAS DENIED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS OF LAW BY THE TRIAL COURT'S REPEATED WARNINGS TO THE KEY WITNESS FOR THE STATE THAT, UNLESS THE WITNESS RETRACTED HIS AFFIDAVITS SWEARING HIS TRIAL TESTIMONY TO BY UNTRUE, THE WITNESS WAS COMMITTING PERJURY AND SUBJECT TO AN EXTENSIVE PRISON TERM.

PARTIES

In the Florida Supreme Court, Petitioner, Joseph Green Brown, was the Appellant, and the State of Florida was the Appellee.

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PRELIMINARY STATEMENT

Respondent accepts that portion of the Petition for Writ of Certiorari setting forth the Citation to Opinion Below, Questions Presented, and Constitutional and Statutory Provisions involved found of pages i, 1, 2 through 5, of the Petition. In accepting the Questions Presented, Respondent does not accept any assumptions of law contained in the points as set forth.

JURISDICTION

Respondent cannot accept Petitioner's assertion that this Court's jurisdiction has been properly invoked pursuant to 28 U.S.C. § 1257(3), in that (1) Petitioner has failed to present substantial federal questions entitling him to this Court's exercise of its jurisdiction; and (2) the filing of said Petition for Writ of Certiorari is belated and contrary to the case authorities cited by Petitioner, to-wit: Wilkins v. United States, 441 U.S. 468 (1979); Tagliantti v. United States, 394 U.S. 316, (note 1,1969); Heflin v. United States, 358 U.S. 415, 418 (note 7, 1959); and Fuller v. Alaska, 393 U.S. 80 (1968); Petitioner in an unsworn letter without supporting documentation indicated that his original trial counsel and appellate counsel failed to take the requisite action to file a timely Petition for Writ of Certiorari in the United States Supreme Court. There is nothing in the Petition or the letter filed with said Petition that would indicate that Petitioner's new counsel attempted to apprise this Court of the circumstances in which Petitioner found himself nor did they try to seek leave of this Court to file a belated Petition. Under the new rules of this Court, Rule 20(3):

> The clerk will refuse to receive any Petition for a Writ of Certiorari which

is jurisdictionally out of time.

While Respondent does not pretend to suggest that the new rules of this Court be applicable to Petitioner's cause, Respondent would submit that the lame excuse presented by Petitioner's current counsel is neither persuasive nor supported by compelling authority which would entitle Petitioner to the belated review by this Court.

STATEMENT OF THE CASE

Petitioner does not accept the Statement of Facts as presented by Respondent and would tender the following facts as set forth by the Supreme Court of Florida in its opinion in Brown v. State, 381 So.2d 680 (Fla. 1980).

> The appellant, Joseph Green Brown, was convicted rape, robbery, and first-degree murder. The conviction was based primarily on the testimony of Ronald Floyd, who was with the appellant immediately prior to the crime and immediately afterwards. The facts, as revealed by Floyd's testimony, indicate that on the date of the murder, the defendant, Floyd, and a third man known as "Poochie" who has never been located, drove to a clothing shop where the murder was committed. The appellant and Poochie parked the car across the street from the shop and walked into the shop. Apparently unaware of thereason for the visit to the shop, Floyd was left sitting in the car. After waiting for approximately fifteen minutes, Floyd got out of the car and walked over to the front door of the shop. He then heard a gunshot and immediately opened the door and entered the shop. He saw Poochie standing in the doorway of what appeared to be a storage room in the rear of the shop. When Floyd looked over the counter, he saw the body of the victim on the other side of the storage room door. The three men raced out of the shop and drove speedily away. While in the car, Poochie turned to the appellant and said,"Man, you didn't have to do that."

Floyd testified that when appellant first got out of the car to cross the street and enter the clothing store, he had a bulge in his shirt which seemed to be a gun. According to Floyd, all of these events took place in the early afternoon of July 7, 1973.

At approximately 9:30 that evening, the body of the victim was discovered in the storage room of the clothing store. She had been raped and murdered. On the evening of and subsequent to the murder, the defendant and Floyd robbed a couple in a motel and appellant sexually assaulted the female. The following day, the appellant turned himself in to law enforcement officers for the motel robbery.

A verdict of guilty was returned by the jury and an advisory recommendation of a sentence of death was rendered. Appellant was adjudged guilty and sentenced to death on July 3, 1974. On appeal, appellant seeks a new trial on the grounds that: (1) after the trial, Floyd denied that his testimony was true although he ultimately reaffirmed the truth of his testimony; (2) the prosecuting attorney failed to furnish Floyd's statements pursuant to rule 3.220(a), Fla.R.Crim.P.; (3) the state failed to inform appellant's counsel that Floyd's testimony was given in return for favorable consideration in criminal matters pending against him; (4) the appellant was denied a fair trial by an impartial jury due to the systematic exclusion of prospective jurors who voiced opposition to the death penalty; and (5) the appellant was denied a fair trial by an impartial jury due to the prejudicial effect of admitting testimony of other unrelated offenses.

[381 So.2d 691-692]

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

I.

Petitioner on appeal to the Florida Supreme Court raised in Point IV of his direct appeal the issue of whether he was denied a fair trial by an impartial jury as required by the Sixth and Fourteenth Amendment of the United States Constitution due to the systematic exclusion of effective jurors who voiced opposition to the death penalty.

The Florida Supreme Court concluded that the trial court had followed the dictates of Witherspoon v. Illinois, and that the one juror whose exclusion was challenged by Petitioner's trial counsel was properly excluded. The court also found that as to nine other prospective jurors who were excluded, said exclusion was made without objection by defense counsel and therefore without a timely objection, Petitioner was precluded from complaining about the correctness of said exclusion of prospective jurors.

II.

Petitioner's second point for review was briefed in Point III of his direct appeal to the Florida Supreme Court wherein he alleged that a new trial should have been granted due to tne State's alleged failure to inform Petitioner's counsel that the testimony of the State's key witness, Ronald Floyd, was given in return for favorable consideration in this and other criminal matters pending against Floyd.

The Florida Supreme Court in resolving said issue contrary to Petitioner found that there was nothing in the record to suggest that the State did in fact make such promises,

and moreover:

> Although he had an opportunity to do so at the evidentiary hearing on the matter, Appellant offered no testimony to substantiate the affidavit. By remaining silent while a witness testifies in a manner wholly inconsistent with the State's view of the facts, we do not believe that the prosecution engaged in the "deliberate deception of the court and jurors" which is necessary to reverse a conviction on these grounds. Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972).

[381 So.2d at 693]

III.

Petitioner's third issue for review argues that the trial court in its demeanor, method, and manner violated Petitioner's right to due due process in that the trial court pressured the recanting key witness for the State to renounce his affidavit exculpating Petitioner with threats of possible perjury charges. Petitioner admits that said point was raised for the first time in his Petition for Rehearing before the Florida Supreme Court and as such, Respondent would submit that the issue is not properly been before the State appellate court and therefore this Court's decision in Cardinale v. Louisiana, 394 U.S. 437 (1969) controls.

REASONS THE WRIT
SHOULD NOT BE GRANTED

I.

Petitioner goes through a brief recital of why a sufficient federal question has arisen by the Florida Supreme Court's denial of Petitioner's Witherspoon claim and asserts:

> Since Florida has the largest death row in the country (142 people) and is sentencing people to death at the rate of three each month, this Court should grant certiorari to correct the Supreme Court of Florida and establish firmly the federal constitutional limitations on death qualifying juries in that state.

[Petitioner's Petition - 13]

Petitioner breaks down his argument into three parts: (1) the exclusion of equivocating jurors, (2) the exclusion during the guilt-innocence stage of those who could fairly pass upon guilt-innocence and whose difficulties lay only with the penalty, and (3) defense counsel's failure to object. Respondent would admit that the crucial issue before this Court is whether the failure on the part of Petitioner's trial counsel to object to the exclusion of nine of the ten individual jurors excused at trial, bars Petitioner in the instant Petition from complaining about whether said jurors were excused in violation of Witherspoon v. Illinois, 391 U.S. 510, rehearing denied 393 U.S. 898 (1968).

The Florida Supreme Court in addressing this issue held:

> Appellant charges that he was denied a fair trial by impartial jury due to the systematic exclusion of prosepective jurors who voiced opposition to the death penalty. Witherspoon v. Illinois, 91 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2nd 776 (1968). We disagree. Nine of the ten jurors who were excluded had been excluded before the Appellant made his objection on this ground. In Paramore v. State, 229 So.2d 855 (Fla.1969) vacated on other grounds, 408 U.S. 935 , 92 S.Ct.

2857, 33 L.Ed.2d 751, (1972) we responded to a similar argument by stating:

> If defendant objects to a prospective juror or being excused he should make his objection before the juror is excused . . . . When these three prospective jurors expressed their conviction against the infliction of the death penalty, Appellant's attorney made no effort to qualify them for service. Perhaps he did not want them for some other reason. It was not the duty of the trial court to take other steps toward attempting to qualify the veniremen and the Witherspoon case, supra, should not be construed as imposing this additional duty upon the trial court in the absence of any expression of a desire by defense counsel to keep the prospective jurors. . . The Appellant is in no position to complain in the instant case because no objection was interposed . . . . Id at 858.

[Brown v. State, 381 So.2d 690, 693, 694 Florida, 1980]

Respondent would submit that the Florida Supreme Court's decision is in compliance with this Court's decision in Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977) wherein this Court held that a defendant who did not contemporaneously object and whose attorney did not contemporaneously object, during the defendant's state trial to the involuntariness of the defendant's confession waived his objection and could not thereafter raise the issue for habeas corpus review. Similarly, in the case at bar where Petitioner's trial counsel at no point objected to the excusing of nine of the ten jurors for cause based on their proclivity to be against capital punishment and unable to impose a verdict of guilt, the Wainwright v. Sykes, supra,

rationale is applicable. Florida requires a contemporaneous objection to the exclusion of jurors by defense counsel at the time of exclusion. See, Paramore v. State, 229 So.2d 855 (Fla. 1969). Moreover, in Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978) that court held:

> During a voir dire examination of the jury, counsel for Spinkellink contemporaneously objected to the exclusion for cause of two veniremen in question. His counsel did not however, raise any of these contentions regarding the veniremen exclusion on direct appeal to the Florida Supreme Court. Additionally, although a court reporter reported the voir dire testimony, neither Spinkellink nor his trial counsel requested the court reporter to transcribe it, and his trial counsel even expressly excluded the voir dire examination from testimony designated to be transcribed for the appellate record. The Florida Supreme Court on a collateral review, Spinkellink v. State, supra, and the District Court below, both relying on Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977) found that Spinkellink had waived his contentions regarding the exclusion of the two veniremen.
>
> [Id. at 591]

In the instant case, Petitioner as to nine of the ten jurors excluded made no effort at all to qualify these witnesses before they were excluded but rather acceded to the wishes of the State. Petitioner's trial counsel could have asked any relevant question in an attempt to qualify these prospective jurors. He did not. Once the goverment makes a showing that the person is not qualified to serve as a juror, it is incumbent upon the defense to clarify the matter by showing the juror is not subject to removal or suffer the consequences. In nine of the ten instances in the instant case, Petitioner's trial counsel did not even attempt to demonstrate that the juror was not disqualified under Witherspoon v. Illinois, supra. To suggest now that counsel not be required to make a contemporaneous objection to the

exclusion of said individuals would violate this Court's decisions in Wainwright v. Sykes, supra, Estelle v. Williams, 425 U.S. 501 (1976); and Francis v. Henderson, 425 U.S. 536 (1976).

Petitioner attempts to preserve his alleged Witherspoon complaint regarding the nine unobjected to excused jurors by stating:

> At Petitioner's trial, moreover, there was no failure. Remedial measures were still possible when counsel objected on all of the grounds raised in this Petition. Petitioner's rights certainly were not waived by his counsel's mere delay.

[Petitioner's Petition - 20]

Respondent would submit to the contrary. This Court, in Wainwright v. Sykes, supra, recognized Florida's contemporaneous objection rule, and to suggest now that a defense counsel may wait until said jurors have been excused to challenge their excusal forever denies the State and the reviewing court the opportunity to address the challenges made by a given defendant. Petitioner's trial counsel cannot simply sit idly by and not timely voice his objection to the excusing of jurors. Wainwright v. Sykes, supra.

The sole juror that was excused following a timely objection by Petitioner's trial counsel was excused correctly following the dictates of Witherspoon v. Illinois. The Florida Supreme Court in reviewing this issue noted:

> The one prospective juror who was excused after timely objection was properly excused for cause in accordance with the Witherspoon standards. During the voir dire examination of that prospective juror, the following colloquy occurred:
>
> A. I have been listening all afternoon but sitting up there I just don't think I could recommend a verdict of death. Capital punishment.

Q. (Prosecuting attorney) Well, would this stem from your feeling that you have about the death penalty?

A. Yes. I don't think I could recommend for anyone to be put to death.

Q. Regardless of the circumstances.

A. I don't think so. Life imprisonment yes, but not the death penalty.

* * *

Q. (Defense counsel) Ma'am, if I may get this just straight, I have tried to pin down exactly what it is you feel that would hinder you in your decision. Is it the fact that you might have to recomment, should we get to the second portion of this trial, the death penalty?

A. Yes, sir.

Q. That is what bother you?

A. Yes.

Q. Specifically what? And would it hinder you in reaching your decision as to guilt or innocence?

A. Well, it might if I thought I recommended guilty and he would be put to death, or whoever it was.

We have recently held that a prospective juror may be excused for cause if it is shown that he "would vote against death regardless of the facts presented or the instructions given." Jackson v. State, 366 So.2d 752, 755 (Fla. 1978). We have also upheld the exclusion of a prospective juror who said that he wouldn't know if he could find the defendant guilty where it might result in capital punishment. Williams v. State, 228 So.2d 377, 381 (Fla. 1969) vacated on other grounds,408 U.S. 941, 92 S.Ct. 2864, 33 L.Ed.2d 765 (1972). There we stated:

> As was said in Witherspoon, "the most that can be demanded of a venireman . . . is that he be willing to consider all of the penalties provided by state law . . . ." 391 U.S. at 522, 88 S.Ct. at 1777, note 21. If upon questioning

> the prospective juror says he doesn't know whether he can vote for conviction if if might mean the electric chair, then the state cannot determine his willingness to consider all penalties. Nor can it determine whether or not the veniremen's attitude toward the death penalty would prevent him from making an impartial decision as to guilt. Id. at 381 (Emphasis in original). In this case the prospective juror made it clear that her decision as to guilt or innocence might well be affected by her attitude toward the death penalty. We find that the trial court correctly followed the dictates of Witherspoon and properly excused this prosective juror.
>
> [381 So.2d 694]

In the instant case, it was made patently clear that the juror's opposition to the death penalty would prevent her from making an impartial decision as to the Petitioner's guilt and further would not enable her to consider imposition of the sentence of death. The Florida Supreme Court so found, citing to this Court's decision in Witherspoon, supra, and the record in this case supports said finding. Further, Respondent would submit that Petitioner's reliance on this Court's decisions in Boulden v. Holman, 394 U.S. 478 (1968) and Maxwell v. Bishop, 398 U.S. 262 (1970) are distinguishable from the case at bar. In Boulden, supra, this Court determined that there were at least eleven instances where the Witherspoon rule had been violated. In each of the circumstances, there was nothing more than a yes-no type response to inquiries made as to whether a given prospective juror believed in capital punishment or would ever inflict the death penalty in any case. Similarly, in Maxwell v. Bishop, supra, the inquiries made therein generated tentative answers in terms of "might" and"thought"as opposed to the definitive responses obtained from the one juror whose excusal is under scrutiny herein. Thus, Boulden and Maxwell do not support Petitioner's claim

that the juror in the instant case was improperly excluded.

Petitioner's last assertion is that the exclusion of the jurors in the case at bar was unnecessary because:

> (1) The guilt/innocence stage of Petitioner's trial was, and by statute had to be, distinct from the sentencing stage under the Florida scheme and,
>
> (2) The jury in Florida merely recommends a sentence and the court could have inquired of the jurors recommending life imprisonment whether their recommendation resulted from a refusal to recommend the death sentence in any imaginable case or from their weighing of the aggravating and mitigating circumstances in the case at bar--and then ignored the votes of those who were unalterably unable to recommend death.

[Petitioner's Petition 15-16]

Respondent would first submit that this particular argument was never presented to the Florida Supreme Court for review, but rather, has been raised for the first time in Petitioner's Petition for Writ of Certiorari. Therefore, this Court's decision in Cardinale v. Louisiana, 394 U.S. 437 (1969) controls.

Assuming arguendo, that this issue is properly before this Court for consideration, Respondent would submit that this Court has rejected a similar if not identical claim of this nature in Proffitt v. Florida, 428 U.S. 242 (1976) and Gregg v. Georgia, 428 U.S. 153 (1976); see Spinkellink v. Wainwright, 578 F.2d at 592 through 596 (5th Cir. 1978).

Finally, Petitioner's reliance on this Court's decision in Adams v. Texas, 65 L.Ed.2d 581, 100 S.Ct. 2521, (1980) is totally inappropriate. In Adams v. Texas, this Court held that the exclusion of prospective jurors on the

ground that they were unwilling or unable to take the statutory oath to the effect that a mandatory penalty of death or life imprisonment would not have effected their deliberation on any issue or fact contradicted the Sixth and Fourteenth Amendments. Specifically, the court held:

> We repeat that the State may bar from jury service those whose beliefs about capital punishment will lead them to ignore the law or violate their oaths. But in the present case, Texas has applied Section 12.31(b) to exclude jurors whose only fault was to take their responsibility with special seriousness or to acknowledge honestly that they might or might not be affected. It does not appear in the record before us that these individuals were so irrevocably opposed to capital punishment as to frustrate the State's legitimate efforts to administer its constitutionally valid death penalty scheme.

[65 L.Ed.2d at 593]

Based on the foregoing, Respondent would respectfully submit that Petitioner has failed to demonstrate that the Florida Supreme Court has rendered in its opinion a decision contrary to this Court's decision in Witherspoon v. Illinois, supra.

II.

Petitioner asserts that the prosecutor failed to disclose to the defense that he had promised Ronald Floyd, the "only" person able to place Petitioner at the murder scene, that he, Floyd, would not be prosecuted for the Barksdale murder if inter alia, Floyd testified against Petitioner. The crux of the problem herein is that the prosecutor "allowed Floyd to testify without correction or contradiction that no such promise had been made, and that he asserted in his closing argument that he had not offered Floyd immunity." [Petitioner's Petition 21]. The Florida Supreme Court in reviewing this point on direct appeal concluded that the evidence presented was insufficient to support Petitioner's allegations. Specifically, the court noted:

> Appellant next argues that he is entitled to a new trial on grounds that the State failed to inform defense counsel of the testimony of the State's key witness, Floyd, was given in return for favorable consideration in this and other criminal matters pending against Floyd. Floyd testified at trial that the State had given him no promises of favorable consideration in this case or any other case as an inducement for his testimony against Appellant. This testimony is consistent with the State's version of the pre-trial discussion with Floyd. The Appellant's claim is based on statements made in the March, 1975, affidavit of Floyd which indicated that the State had promised favorable treatment in exchange for his testimony against the Appellant. Although Floyd retracted part of that statement at the evidentiary hearing on the matter, at the same time he reaffirmed his claim as to promises of favorable treatment. At the same hearing, the State denied that any promises were made. The Appellant's claims rest solely on the affidavit of Floyd. There is nothing in the record to suggest that the State did in fact make such promises. Although he had an opportunity to do so at the evidentiary hearing on the matter, Appellant offered no testimony to substantiate the affidavit. By remaining silent while a witness testifies in a manner wholly inconsistent with the State's view of the facts,

> we do not believe that the prosecution engaged in "deliberate deception of a court and jurors" which is necessary to reverse a conviction on these grounds. Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 105 (1972).
>
> [381 So.2d at 693]

Respondent would invite this Court's attention to its decision in Hysler v. Florida, 315 U.S. 411, 86 L.Ed. 933 (1941):

> The essence of Hysler's claim before the Supreme Court of Florida was that his conviction was secured by unconstitutional means, that Baker was coerced to testify falsely by responsible State officials. The court had to judge the substantiality of this claim on the basis of al that was before it, namely, the Petition with its accompanying affidavits and the record of prior cases arising out of the same crime. The court concluded that Hysler's proof did not make out a prima facie case for asking the trial court to reconsider its judgment of conviction. However, ineptly the Florida Supreme Court may have formulated the grounds for denying the application, its action leaves no room for doubt that the court deemed the Petitioner's claim without substantial foundation. We construe its finding that the "Petition" did not show the responsibility of the State officials for the alleged falsity of Baker's original testimony to mean that the Petitioner had failed to make the showing of substantiality which, according to the local procedure of Florida, was necessary in order to obtain the extraordinary relief furnished by the writ of error quorum nobis and our independent examination of the affidavits upon which his claim was based leaves no doubt that the findings of insubstantiality was justified. It certainly precludes a holding that such a finding was not jsutified. . .
>
> Our ultimate inquiry is whether the State of Florida had denied to the Petitioner the protection of due process clause. The record does not permit the conclusion that Florida has deprived him of his constitutional rights.
>
> [86 L.Ed. 939]

Respondents would submit that the instant case as

indicated by the Florida Supreme Court is distinguishable from Giglio v. United States, supra. As noted in State v. Matera, 266 So.2d 661 (Fla. 1972):

> Credibility of a witness, as such, like sufficiency of the evidence, has not been recognized as a ground supporting collateral attack on a conviction. Even a petition alleging perjury of a witness at trial is insufficient unless it is also alleged that the perjured testimony formed the basis for the conviction, was knowingly used by the prosecution, and was unknown to defendant at the time of the trial or during appeal. The somewhat related ground of knowing suppression of evidence by the State must also be accompanied by allegations that the evidence suppressed was essential to the conviction and that defendant was unaware of its existence or unable to obtain its disclosure . . . .
>
> [266 So.2d 663-664]

See, Anderson v. United States, 403 F.2d 451, 454 (7th Cir. 1968) cert.denied 394 U.S. 903.

While the testimony in the case at bar is conflicting as to whether the State "promised" Floyd consideration for his testimony, there is no indication in the record that defense counsel was unaware of said alleged promises, or that said promises had anything to do with Floyd's agreement to testify, since it was proffered by the State that said negotiations were completed prior to Floyd's agreement to testify. There were no promises as to penalty based on whether Appellant was to testify and that indeed, any "promise" in the case at bar regarding the State's not prosecuting Floyd for the Barksdale murder was predicated of Floyd's testifying truthfully and Floyd's successfully passing a polygraph test.

Based on the foregoing, Respondent would respectfully submit that Petitioner has failed to present sufficient facts and a cogent claim which would entitle him to this Court's review on his second issue.

III.

Petitioner's third point for consideration is not properly before this Court in that Petitioner belatedly raised this point on a Petition for Rehearing on direct appeal following the Florida Supreme Court's decision rendered January 31, 1980. Petition for Rehearing was summarily denied April 21, 1980. Thus, in attempting to address this issue on rehearing, Petitioner has failed to properly bring this issue before the highest State appellate court for review and therefore the Florida Supreme Court has not had an opportunity to make a determination as to the validity of Petitioner's claim. In Cardinale v. Louisiana, 394 U.S. 437, this Court opined:

> In view of Petitioner's admitted failure to raise the issue he presents here in any way below, the failure of the State court to pass on this issue, the desirability of giving the State the first opportunity to apply its statute on an adequate record, and the fact that a federal habeas remedy may remain if no State procedure for raising the issue is available for Petitioner, the writ is dismissed for want of jurisdiction.

[Id. at 439]

Pursuant to the Florida Rules of Appellate Procedure applicable at the time of Petitioner's pleadings, Rule 9.330(a) reads in part:

> A motion for rehearing or for clarification of decisions may be filed within 15 days of an order or within such other time set by the court. The motion shall state with particularity the points of law or fact which the court has overlooked or misapprehended. The motion shall not reargue the merits of the court's order.

Further, points not presented to the trial court nor referred to in arguing on appealwill not be decided by an appellate court on rehearing. O'Steen v. State, 111 So. 725 (Fla. 1927).

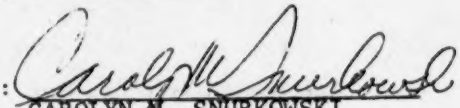
Based on the foregoing, Respondent would submit that Point III of Petitioner's pleading is not subject to review by this Court.

CONCLUSION

Based on the foregoing reasons, Respondent would respectfully urge that Petitioner's Petition for Writ of Certiorari be denied.

Respectfully submitted:

JIM SMITH
ATTORNEY GENERAL

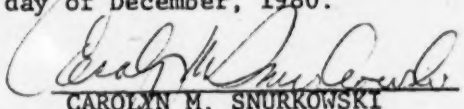
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished JOHN CHARLES BOGER, Suite 2030, 10 Columbus Circle, New York, New York, 10019 via United States mail on this 17th day of December, 1980.


CAROLYN M. SNURKOWSKI
Assistant Attorney General